STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 11, 2010
v	No. 289864 Wayne Circuit Court
GERARDO DIAZ, Defendant-Appellant.	LC No. 08-006880-FH

Before: TALBOT, P.J., and FITZGERALD and M.J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for two counts of felon in possession of a firearm, MCL 750.224f, and two counts for possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to three years' probation for each felon in possession of a firearm conviction, and two years' imprisonment for each felony-firearm conviction. We affirm.

Defendant first contests the existence of exigent circumstances justifying the conduct of a warrantless search of his apartment by police. In reviewing the denial of a motion to suppress, the trial court's ultimate decision is reviewed de novo, while its underlying findings of fact are reviewed for clear error. *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001). "Both the United States and Michigan Constitutions guarantee the right against unreasonable searches and seizures." *Beuschlein*, 245 Mich App at 749 n 2, citing US Const, Am IV; Const 1963, art 1, § 11. "The lawfulness of a search or seizure depends on its reasonableness." *Id.* at 749. In general, searches without warrants are per se unreasonable under the Fourth Amendment unless one of the established exceptions to the warrant requirement applies. *People v Snider*, 239 Mich App 393, 407; 608 NW2d 502 (2000).

The "exigent circumstances" exception to the search warrant requirement provides that the police may search without a warrant in cases of "'actual emergency'" if there are "'specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect.'" *Beuschlein*, 245 Mich App at 749-750 (citation omitted). In accordance with the exigent circumstances exception, both probable cause and reasonableness must be demonstrated. *People v Cartwright*, 454 Mich 550, 558; 563 NW2d 208 (1997). "Probable cause exists when the facts and circumstances known to the police officers at the time of the search would lead a reasonably prudent person to believe that a crime has been or is being committed and that

evidence will be found in a particular place." *Beuschlein*, 245 Mich App at 750. The existence of exigent circumstances must be determined on a case-by-case basis.

Specific and objective facts existed in this case, justifying the search of defendant's apartment for the protection of the police officers and other individuals present at the scene. The police were dispatched to the scene based on a report of "shots fired." Upon arrival, the officers observed broken glass on the floor and two hysterical women who informed the officers that defendant was "crazy" and that he had guns in his upstairs apartment. The officers confirmed that defendant had a prior felony conviction. Upon entering defendant's apartment, the officers immediately inquired whether defendant had guns in his home. Although defendant initially provided a negative response, without further questioning, defendant voluntarily changed his answer and admitted to the presence of guns in the living room of his home. As such, the officers had probable cause to believe that guns were present in the apartment and it was, therefore, reasonable for them to conduct a protective sweep to locate the guns for the safety of themselves and others in the building. Once the police officers lawfully entered the living room, because the guns were in plain view they were properly seized. *See People v Champion*, 452 Mich 92, 101-102; 549 NW2d 849 (1996); *Beuschlein*, 245 Mich App at 758.

Further, defendant implies that the only applicable exception to the warrant requirement would have been a "search incident to arrest," limiting the scope of the search to defendant's kitchen, which was the area within defendant's immediate physical control. *See Chimel v California*, 395 US 752, 763; 89 S Ct 2034; 23 L Ed 2d 685 (1969). However, the police arrived at the scene of a potentially volatile domestic dispute. Three people, including defendant, informed the police officers that guns were present in defendant's apartment. Based on the specific facts of this case, the officers had reasonable concerns for their safety and the safety of other people present at the scene. Thus, exigent circumstances existed permitting officers to conduct a warrantless search of defendant's living room.

Defendant also contends that he was in custody at the time he admitted ownership and the location of the guns in his apartment, and was therefore entitled to *Miranda*[1] warnings before being questioned by the police officers. Because defendant failed to properly preserve this constitutional issue, appellate review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999). For a plain error to affect the defendant's substantial rights, the error must be prejudicial, meaning it must have affected the outcome of the proceedings. *People v Jones*, 468 Mich 345, 356; 662 NW2d 376 (2003). "The defendant bears the burden of persuasion with respect to prejudice." *Id.*

Miranda warnings are not required unless the accused is subject to a custodial interrogation. *People v Kulpinski*, 243 Mich App 8, 25; 620 NW2d 537 (2000). A "custodial interrogation" occurs when law enforcement officers initiate questioning after the accused "has been taken into custody or otherwise deprived of his freedom of action in a significant way." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). Whether the accused was in custody depends on the "totality of the circumstances," but the key question is whether the

[1] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

accused could reasonably believe that he was not free to leave. *Yarborough v Alvarado*, 541 US 652, 661-662; 124 S Ct 2140; 158 L Ed 2d 938 (2004); *People v Marsack*, 231 Mich App 364, 374; 586 NW2d 234 (1998). General, on-the-scene questioning by law enforcement officers to investigate the facts surrounding a crime does not necessarily implicate *Miranda* warnings. *People v Ish*, 252 Mich App 115, 118; 652 NW2d 257 (2002), citing *People v Hill*, 429 Mich 382, 398; 415 NW2d 193 (1987).

Defendant was not subject to a custodial interrogation at the time the officers questioned him regarding the presence of guns in his apartment. The officers arrived on the scene in response to reports of "shots fired" and observed a broken window and aquarium. They first encountered defendant's ex-wife and younger daughter, both of whom warned the officers that defendant was in possession of guns. The officers knocked at defendant's door and immediately, after entry, inquired if there were guns on the premises. The officers' questioning of defendant involved an on-the-scene inquiry regarding the facts surrounding the alleged crime and, thus, did not require *Miranda* warnings.

Furthermore, defendant was not in custody when the officers questioned him about the guns because defendant was not deprived of his freedom of action in any significant manner. The police officers' statements that they subjectively knew they were going to arrest defendant is not the proper inquiry for determining the custodial status of an accused. Rather, the test is whether defendant reasonably believed that he was not free to leave when he opened the door for the police. Defendant knew his ex-wife called the police to the scene to investigate a domestic dispute and was anticipating the arrival of police. Defendant knew the police officers would want to speak to him regarding the incident. It would not be reasonable for defendant to believe that he was under arrest as soon as the police knocked and he allowed them entry into his kitchen. Therefore, the trial court did not err in admitting defendant's statements into evidence.

In the alternative, defendant argues even if this Court finds *Miranda* warnings were not required, his admission was not voluntary because it was not a spontaneous statement as defendant was not free to leave his apartment when the police officers were engaged in questioning him. Both the United States and Michigan Constitutions guarantee the right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17; *People v Bassage*, 274 Mich App 321, 324; 733 NW2d 398 (2007). This right "protects a defendant from being compelled to testify against himself or from being compelled to provide incriminating evidence of a testimonial or communicative nature." *People v Geno*, 261 Mich App 624, 628; 683 NW2d 687 (2004); see also *US v Hubbell*, 530 US 27, 34; 120 S Ct 2037; 147 L Ed 2d 24 (2000). "Statements of an accused made during a custodial interrogation are inadmissible unless the accused knowingly, intelligently, and voluntarily waived his Fifth Amendment right." *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). Usually, there is no Fifth Amendment violation when an accused was not in custody when the initial statements were made. *Beckwith v United States*, 425 US 341, 346; 96 S Ct 1612; 48 L Ed 2d 1 (1976). However, even non-custodial interviews may require a determination of whether a defendant's statement was voluntary, consistent with Fifth Amendment protections. *Id.* at 347-348. In such situations, the appellate court must make an independent determination on the ultimate issue of voluntariness by examining the entire record. *Id.* at 348.

Defendant was not subject to a custodial interrogation at the time he admitted to the presence of guns in his apartment. Thus, our inquiry is focused on whether defendant's

statements were freely and voluntarily given. Defendant opened the door, allowed the officers into his kitchen, and the officers asked defendant if there were guns in his apartment. The record does not suggest that the officers threatened, coerced, intimidated, or otherwise forced defendant to respond to their questions. It was defendant's choice to respond to the question, and defendant freely and voluntarily elected to answer the query. Thus, the trial court did not err in admitting defendant's response to the question posed by police into evidence.

As his final contention of error on appeal, defendant argues that convicting and punishing him for both felon in possession of a firearm and felony-firearm violated double jeopardy. Defendant failed to preserve this constitutional issue by not raising the issue before the trial court, and review is limited to plain error affecting the defendant's substantial rights. *Carines*, 460 Mich at 761-764. As discussed by this Court in *People v Meshell*, 265 Mich App 616, 628-629; 696 NW2d 754 (2005):

> The United States Constitution and the Michigan Constitution "'prohibit placing a defendant twice in jeopardy for a single offense.'" The Double Jeopardy Clause protects against multiple punishments for the same offense in order to protect the defendant from being sentenced to more punishment than the Legislature intended. The Double Jeopardy Clause functions as a restraint on the prosecutor and the court, but "does not limit the Legislature's ability to define criminal offenses and establish punishments . . . ."
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> The test to determine whether multiple punishments may be imposed is the same under both the federal Double Jeopardy Clause and the Michigan Double Jeopardy Clause: "'in the context of multiple punishments *at a single trial*, the issue whether two convictions involve the same offense for purposes of the protection against multiple punishment is solely one of legislative intent.'" [Internal citations omitted.]

The Michigan Supreme Court has held that, with the exception of four specifically enumerated felonies, none of which are relevant to this case, the Legislature intended to provide for an additional felony charge and sentence whenever a defendant possessing a firearm committed a felony. *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998). Specifically, Michigan courts have held that double jeopardy is not violated when a defendant is convicted of both felon in possession and felony-firearm, and then sentenced to cumulative punishments. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003); *People v Dillard*, 246 Mich App 163, 166-167; 631 NW2d 755 (2001). Therefore, defendant's conviction of both felon in possession of a firearm and felony-firearm did not violate double jeopardy.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Michael J. Kelly